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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 520

CHARLIE L. WILSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE COMMISSIONER OF INTERNAL REVENUE

The Court lacks jurisdiction of the direct appeal the petitioner purports to have taken pursuant to 28 U.S.C. 1253. This is an income tax case in which the Tax Court's decision (R. 48-51) was affirmed on appeal to the Fifth Circuit (J.S. App. A1). Accordingly, 28 U.S.C. 1253 which relates to certain orders of three-judge courts is inapplicable. The proper mode of review is by petition for a writ of certiorari. 28 U.S.C. 1254(1).

If a party improvidently appeals from a decision of a court of appeals when the proper mode of review

is by petition for certiorari, "this alone shall not be ground for dismissal." 28 U.S.C. 2103.[1] However, in the instant case there is another adequate ground for dismissal. The court of appeals entered judgment in this case on January 18, 1965, and taxpayer filed a document denominated Notice of Appeal in this Court on February 15, 1965. Thus, according to his theory, the jurisdictional statement was due on April 16, 1965. (28 U.S.C. 2101(a), Revised Rules of the Supreme Court, Rule 13.) However, taxpayer took no further action until September 2, 1965, when he docketed his appeal and filed a "Jurisdictional Statement."[2] He thus filed neither a petition for certiorari nor a jurisdictional statement until 7½ months after the court of appeals' judgment. His untimely attempt to perfect this appeal does not qualify as a timely petition for certiorari.

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[1] 28 USC 2103 provides that:

> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

[2] A copy of the "Jurisdictional Statement" was, however, served on the Department of Justice on July 31, 1955.

Assuming, however, that taxpayer's Notice of Appeal may be treated as a timely petition for a writ of certiorari, it should be denied. The court of appeals (J.S. App. A1), affirming the Tax Court (R. 48-51), held (1) that taxpayer's income as a minister of the gospel, which he claimed was exempt from taxation by the Scriptures, was taxable; (2) that dues paid to the Georgia Motor Club were not deductible as dues to a professional society; (3) that home repairs were personal rather than deductible expenses; (4) that damage caused by a flat tire and a leaky roof did not qualify as deductible casualty losses; and (5) that he had failed to prove that sewage assessments were deductible taxes. Compensation for services is expressly included in the general definition of gross income contained in Section 61 of the Internal Revenue Code of 1954. The dues paid to the Georgia Automobile Club and the expenditures for alterations on taxpayer's personal residence were properly disallowed as personal expenses prohibited by Code Section 262. See, *e.g.*, Treas. Regs. § 1.162-6. The leaky roof and flat tire damage resulted from the decomposition of the items in question and therefore were not casualty losses of the nature contemplated by Section 165 of the Code. *Matheson* v. *Commissioner*, 54 F. 2d 537 (C.A. 2); *Levy* v. *Commissioner*, 212 F. 2d 552 (C.A. 5); *Rosenberg* v. *Commissioner*, 198 F. 2d 46 (C.A. 8). The sewage assessments ($10.80 in each of two taxable years) were not shown to be taxes deductible under Section 164. Instead, the courts below could only conclude from the evidence that they were either spec-

ial assessments or service charges. See Int. Rev. Code of 1954, § 164(b)(5) (26 USC, 1958 ed.) now Int. Rev. Code of 1954, § 164(c)(1) (26 USC, 1964 ed.); *Mahler* v. *Commissioner*, 119 F. 2d 869 (C.A. 2), certiorari denied, 314 U.S. 660.

The appeal should therefore be dismissed. Treating it as a petition for a writ of certiorari, it should be denied.

Respectfully submitted,

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